

## FEDERAL MAGISTRATES COURT OF AUSTRALIA

*NGUYEN v MINISTER FOR IMMIGRATION & ANOR* [2009] FMCA 902

MIGRATION – Partner visa – whether Tribunal can accept / reject evidence – weight is question for Tribunal – whether Tribunal required to mention all issues.

*Federal Magistrates Court Rules 2001* (Cth), r.44.12

*Migration Act 1958* (Cth), ss.65, 348, 368

*Migration Regulations 1994* (Cth), r.1A, 1.15A, Schedule 2 clauses 820.21, 820.22

*Judiciary Act 1903* (Cth) s.39B

*Tickner & Ors v Chapman & Ors* (1995) 57 FCR 451

*Ndegwa v Minister for Immigration* [2005] FMCA 74

*Nu Shan Liang v Minister for Education and Ethnic Affairs* 185 CLR 259

*Davis v Minister for Immigration and Multicultural and Indigenous Affairs*

(2004) FCA 686 *Chey v Minister for Immigration and Citizenship* (2007) FCA 871

*NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10

*Re Minister for Immigration and Multicultural Affairs; ex parte*

*Durairajasingham* (2000) 168 ALR 407

*Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 (FC)

*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259

*Abebe v Commonwealth* (1999) 197 CLR 510

*Lee v Minister for Immigration and Multicultural Affairs* [2005] FCA 464

*W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703

*Devries v Australian National Railways Commission* (1993) 177 CLR 472

*Yao-Jing Li v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275

*Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155

*Luu & Anor v Renevier* (1989) 91 ALR 39

*Rhandawa v MIEA* (1994) 52 FCR 437

*Abalos v Australian Postal Commission* (1990) 171 CLR 167; 96 ALR 354

*Applicant WAEE v Minister for Immigration and Multicultural Affairs* (2003) 75 ALD 630

*MZXIV v Minister for Immigration and Anor (No 2)* [2006] FMCA 1454

*Li v Minister for Immigration and Citizenship* 96 ALD 361  
*WAMB v Minister for Immigration and Multicultural and Indigenous Affairs*  
[2007] FCA 66  
*Re Minister for Immigration and Multicultural Affairs, Ex parte Applicant S*  
20/2002 (2003) 198 ALR 59  
*NBIO v Minister for Immigration and Multicultural Affairs* [2006] FCA 1300  
*VWFP and VWFO v Minister for Immigration and Multicultural Affairs* [2006]  
FCA

|                          |                                           |
|--------------------------|-------------------------------------------|
| Applicant:               | MINH HAI NGUYEN                           |
| First Respondent:        | MINISTER FOR IMMIGRATION &<br>CITIZENSHIP |
| Second Respondent:       | MIGRATION REVIEW TRIBUNAL                 |
| File Number:             | MLG 356 of 2009                           |
| Judgment of:             | Turner FM                                 |
| Hearing date:            | 14 July 2009                              |
| Date of Last Submission: | 14 July 2009                              |
| Delivered at:            | Melbourne                                 |
| Delivered on:            | 22 September 2009                         |

## **REPRESENTATION**

|                                 |                                  |
|---------------------------------|----------------------------------|
| Counsel for the Applicant:      | Mr Gibson                        |
| Counsel for the Respondents:    | Mr Hill                          |
| Solicitors for the Respondents: | Australian Government Solicitors |

## **ORDERS**

(1) The application filed 3 April 2009 is dismissed.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
MELBOURNE**

**MLG 356 of 2009**

**MINH HAI NGUYEN**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**MIGRATION REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

1. This matter is an application for judicial review of a decision of the Migration Review Tribunal (the “MRT”) that affirmed the decision of a Delegate of the Minister for Immigration and Citizenship to not grant the applicant a Partner (Temporary) (Class UK) Visa.
2. The applicant applied to the Department on 13 November 2006 for a Partner (Temporary) (Class UK) and Partner (Residence) (Class BS) Visas (Court Book page 266 point 2).
3. The Delegate refused to grant the applicant a Partner (Temporary) (Class UK) Visa by decision dated 24 October 2007 (Court Book page 140 – 151). The applicant sought a review by the MRT of that decision by application received on 9 November 2007 (Court Book page 152).

4. In order to be granted a Partner (Residence) (BS) Visa the applicant must hold a Partner (Temporary) (Class UK) Visa (Court Book page 266 point 5) The only subclass in respect of which claims have been made in this matter is subclass 820 (spouse) (Court Book page 266 point 7).
5. The primary criteria to be satisfied at the time of application is that the applicant is not the holder of a subclass 771 (Transit) Visa, and that he meets one of the alternative requirements set out in clause 820.211 (2) – (9) of schedule 2 to the *Migration Regulations 1994* (the “Regulations”). Only clause 820.211 (6) is relevant to the applicant’s claimed circumstances. Clause 820.211 (6) provides:

*“(6)An applicant meets the requirements of this subclause if the applicant:*

*(a) is the holder of a Subclass 300 (Prospective Marriage) visa; and*

*(b) has married the sponsoring partner under a marriage that is recognised as valid for the purposes of the Act; and*

*(c) the applicant is sponsored:*

*(i) if the applicant's spouse has turned 18 -- by the spouse; or*

*(ii) if the applicant's spouse has not turned 18 -- by a parent or guardian of the spouse who:*

*(A) has turned 18; and*

*(B) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and*

*(d) continues to be the spouse of the sponsoring partner.”*
6. The principle issue in this case is whether the applicant was the “spouse” of the sponsor at the time of the application and the time of decision (820.21 and 820.22).
7. Regulation 1.15A as at the time of the Tribunal’s decision defined “spouse” as follows.

*“(1) For the purposes of these Regulations a person is the spouse of another if the two persons are:*

*(a) In a married relationship as defined in Regulation 1A;  
or*

*(b) In a de facto relationship as defined in subregulation (2).”*

8. The MRT accepted that the parties are married.

9. Regulation 1.15(1A) provided relevantly that:

*“(1A) Persons are in a married relationship if:*

*(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*

*(b) the Minister is satisfied that:*

*(i) they have mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

*(ii) the relationship between them is genuine and continuing; and*

*(iii) they:*

*(A) live together; or*

*(B) do not live separately and apart on a permanent basis.*

*(2) Persons are in a de facto relationship if:*

*(a) they:*

*(i) are of opposite sexes; and*

*(ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*

*(iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B(2) of the Marriage Act 1961; and*

*(b) they are of full age, that is:*

*(i) if either of the persons is domiciled in Australia – both of them have turned 18;*

*(ii) if neither of the persons is domiciled in Australia – both of them have turned 16; and*

*(c) the Minister is satisfied that:*

*(i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

*(ii) the relationship between them is genuine and continuing; and*

*(ii) they:*

*(A) live together; or*

*(B) do not live separately and apart on a permanent basis; and*

*(d) subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent visa, a Business Skills (Provisional)(Class UR) visa, a Student (Temporary)(Class TU) visa, a Partner (Provisional)(Class UF) visa, a Partner (Temporary)(Class UK) visa, or a General Skilled Migration visa – the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:*

*(i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

*(ii) the relationship between them was genuine and continuing; and*

*(iii) they had:*

*(A) been living together; or*

*(B) not been living separately and apart on a permanent basis; and*

*(e) where either of them is an applicant for a Resolution of Status (Residence) (Class BL) or Resolution of Status (Temporary) (Class UH) visa – the Minister is satisfied (unless the applicant can establish compelling and compassionate circumstances for the grant of the visa) that, for the period of 12 months immediately preceding 13 June 1997:*

*(i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

*(ii) the relationship between them was genuine and continuing; and*

*(iii) they had:*

*(A) been living together; or*

*(B) not been living separately and apart on a permanent basis.”*

10. The MRT found that the applicant and his spouse were married at Springvale on 29 June 2006 (Court Book page 281 point 4). As they are validly married they cannot satisfy an essential requirement of a de facto relationship [Regulation 1.15A(2)(a)(ii)]. The issue to be decided by the MRT was therefore whether the two persons were “*spouses*” within Regulation 1.15A(1A).

11. Regulation 1.15A(3) provided:

*“(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:*

*(ad) a Partner (Migrant) (Class BC) visa; or*

*(ae) a Partner (Provisional) (Class UF) visa; or*

*(af) a Partner (Residence) (Class BS) visa; or*

*(ag) a Partner (Temporary) (Class UK) visa;*

*the Minister must have regard to all of the circumstances of the relationship, including, in particular:*

*(a) the financial aspects of the relationship; including:*

*(i) any joint ownership of real estate or other major assets; and*

*(ii) any joint liabilities; and*

*(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*

*(iv) whether one party to the relationship owes any legal obligation in respect of the other; and*

*(v) the basis of any sharing of day-to-day household expenses;*

*(b) the nature of the household, including:*

*(i) any joint responsibility for care and support of children, if any; and*

*(ii) the parties' living arrangements; and*

*(iii) any sharing of responsibility for housework;*

*(c) the social aspects of the relationship, including:*

*(i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*

*(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*

*(iii) any basis on which the persons plan and undertake joint social activities;*

*(d) the nature of the persons' commitment to each other, including:*

*(i) the duration of the relationship; and*

*(ii) the length of time during which the persons have lived together; and*

*(iii) the degree of companionship and emotional support that the persons draw from each other; and*

*(iv) whether the persons see the relationship as a long-term one."*

12. The MRT must therefore have regard to all the circumstances including those in Regulation 1.15A(3)

13. If two persons have lived together for six months or more that is to be taken as strong evidence that the relationship is genuine and continuing, but a shorter relationship is not to be taken not to be genuine and continuing only for that reason (Regulation 1.15A(5)).



14. The MRT conducted a hearing on 1 October 2008 (Court Book page 272 point 3).
15. The applicant appeared at the hearing on 1 October 2008, gave evidence and presented arguments with the assistance of an interpreter (Court Book page 273 point 5), and was represented by his registered migration agent (Court Book page 272 point 7). The applicant's sponsor gave oral evidence (Court Book page 272 point 5).
16. After the hearing, the MRT received a submission from the applicant's representative enclosing various information. That submission and information was considered by the MRT in reaching its decision (Court Book page 278 points 1 and 2, page 285 point 5 and page 258 point 2).
17. The MRT did not accept much of the applicant's evidence and submissions and did not accept that the applicant and spouse had been truthful witnesses (Court Book page 285 point 2). It found that they had *"told lies in an attempt to conceal, and then explain, the considerable body of evidence which contradicts their claim to be spouses. The Tribunal does not accept their explanations."* (Court Book page 285 point 3).
18. The Tribunal referred in its findings and reasons to a report that the applicant had been having various psychological problems including memory disorder (Court Book page 284 point 5), and found that *"The fact that the applicant has been suffering from depression and anxiety, and that this might account for some of the shortcomings in his evidence,"* (for reasons it sets out), *"it nevertheless does not accept that he has been a truthful witness, and concludes that his relationship with the sponsor has been contrived in order to achieve a migration outcome."* (Court Book page 285 paragraph 115).
19. The Tribunal stated that its *"adverse assessment of the merits of the case is not solely reliant upon its assessment of the applicant's performance at hearing, or even at the departmental interviews."* The Tribunal rejected the psychologists' belief that the applicant's evidence is trustworthy (Court Book page 284 point 7) for the reasons it sets out (Court Book page 284 point 7 – page 285 point 2). The issue of credibility is for the Tribunal and not the psychologist or Court.

20. There is no review available of findings of fact. A finding as to credibility is a finding of fact.
21. In *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10, the Full Court of the Federal Court decided at [10] as follows:

*“In their written submissions, the appellants took exception to a number of findings of the Tribunal. In many cases, those exceptions were purely on the basis that the appellants disagree with the findings. In effect, the appellants sought to have the Court take a different view of various issues of fact from that taken by the Tribunal. To engage in fact-finding about the merits of the appellants’ case is no part of the function of the Court, whether at first instance or on appeal, in dealing with an application for relief under s.39B of the Judiciary Act. As Stone J said, Plaintiff S157 establishes that it is necessary for the appellants to show jurisdictional error on the part of the Tribunal, if they are to succeed. Whatever be the boundaries of jurisdictional error, they do not comprehend errors of fact as to merits of the case put to the Tribunal.”*

22. The Court refers to the following decisions:

*“The Tribunal’s conclusion that the Applicant was not credible and his claims untrue are findings of fact par excellence: Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham (2000) 168 ALR 407 (HCA/McHugh J) at [67]. So long as the Tribunal’s findings were open to it, no error is demonstrated: Kopalapillai v Minister for Immigration and Multicultural (1998) 86 FCR 547 (FC) at 558-559; W148/00A v Minister for Immigration and Multicultural (2001) 185 ALR 703 (FCA/FC) at [64-69] per Tamberlin and RD Nicholson JJ. The Tribunal’s findings were open for the reasons it gives. The Court cannot review the merits of the Tribunal’s decision: MIEA v Wu Shan Liang (1996) 185 CLR 259 at 272, and there is no error of law, in the Tribunal making a wrong finding of fact: Abebe v Commonwealth (1999) 197 CLR 510 at [137].”*

23. As stated by the Federal Court of Australia in *Lee v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 464 at [27]:

*“The Tribunal is entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances.”*

24. In *W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703, Tamberlin and R.D Nicholson JJ stated at [64]:

*“The Tribunal decision turned on the question of credibility. A finding as to credibility is a finding of fact and, as the authorities indicate, a reviewing body must not set aside such a finding simply because it thinks that the probabilities of the case are against, or even strongly against, the finding. As the High Court stated in (1993) 177 CLR 472 at 479; 112 ALR 641 at 646 per Brennan, Gaudron and McHugh JJ:*

*If the trial judge’s finding depends to any substantial degree on the credibility of the witness, the findings must stand unless it can be shown that the trial judge “has failed to use or has palpably misused his advantage” or has acted on evidence which was “inconsistent with facts incontrovertibly established by the evidence” or which was “glaringly improbable”.*

*See also Abalos v Australian Postal Commission (1990) 171 CLR 167 at 179; 96 ALR 354. “This latter case was concerned with the scope for review of a decision founded in part on demeanour where the court at first instance had an opportunity to observe witnesses and form an impression as to the reliability of evidence given in response to questioning. Often a conclusion as to the credibility of a witness will depend not only on the body language and general impression conveyed by a witness in the way in which questions are answered but also on a careful consideration of the factual background or available information, coupled with ordinary experience as to likely patterns of response. Such an impression cannot be communicated by consideration of the transcript alone.”*

25. The Court does not find that the Tribunal has failed to use, or has palpably misused, its advantage, or that it has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable or that the probabilities of the case are strongly against the findings rejecting the evidence of the applicant.
26. The Court refers to the following decisions:

*“The Tribunal’s conclusion that the Applicant was not credible and his claims untrue are findings of fact par excellence: Re Minister for Immigration and Multicultural; ex parte Durairajasingham (2000) 168 ALR 407 (HCA/McHugh J) at [67]. So long as the Tribunal’s findings were open to it, no error is demonstrated: Kopalapillai v Minister for Immigration and Multicultural (1998) 86 FCR 547 (FC) at 558-559; W148/00A v Minister for Immigration and Multicultural (2001) 185 ALR 703 (FCA/FC) at [64-69] per Tamberlin and RD Nicholson JJ. The Tribunal’s findings were open for the reasons it gives. The Court cannot review the merits of the Tribunal’s decision: MIEA v Wu Shan Liang (1996) 185 CLR 259 at 272, and there is no error of law, let alone a jurisdictional error, in the Tribunal making a wrong finding of fact: Abebe v Commonwealth (1999) 197 CLR 510 at [137].”*

27. The following ground and particulars are set in the applicant’s application:

*“1. The decision of the Second Respondent was made in breach of an imperative duty imposed on it or an essential pre-condition to or an inviolable limitation or restraint upon its power and its jurisdiction necessary for the existence of the satisfaction required by s65 to grant or refuse the application and its powers to conduct a review under s348 of the Migrations Act 1958. The Second Respondent exceeded its jurisdiction and/or constructively failed to exercise jurisdiction:*

*(i) The Second Respondent failed to properly consider a mandatory relevant consideration set out in Regulation 1.15A(5) of the Migration Regulations being the duration the sponsor wife and the Applicant lived together at the same address and/or in Regulation 1.15A(3)(d)(ii) being the duration the sponsor wife and the Applicant lived together; and/or*

*(ii) it ignored relevant material in purporting to deal with that consideration – being DIAC evidence regarding the cohabitation of the sponsor wife and the Applicant – so that it can be said that the Tribunal did not properly apply the correct test in determining whether the parties were in a married relationship.”*

28. Registrar Allaway made orders on 6 May 2009 dispensing with a hearing under Rule 44.12 of the *Federal Magistrates Court Rules*.

29. Mr Gibson appeared for the applicant on 14 July 2009 and Mr Hill for the first respondent.
30. It is clear from the MRT's decision that it had regard to the evidence that the applicant and spouse lived together in the same house "*at all relevant times*" or "*6 months or more*" (Court Book page 282 point 6). However, the MRT rejected this as proving that the applicant and sponsor were in a spousal relationship because of the matters it set out. The MRT was entitled to accept or reject the evidence before it. (*Lee Supra*)
31. It is clear from the MRT's decision that it was aware of the evidence that the applicant and sponsor were able to show the officers from the DIAC where items were kept in the master bedroom (Court Book page 269 point 5). However the MRT did not accept that evidence as proving that they were in a spousal relationship.
32. At the hearing the applicant argued two grounds.
33. **One ground** is the alleged failure by the Tribunal to refer in its decision to what the applicant describes as "*crucial material*". The material that the applicant relies on is that the applicant and sponsor "*identified each other's belongings in the master bedroom*". (Transcript page 2 line 23). It was argued that this was a relevant consideration that was not referred to by the Tribunal.
34. **The other ground** is whether the Tribunal looked at the length of time the parties lived together? which is said to be a mandatory relevant consideration by reason that is set out in Regulation 1.15A (Transcript page 2 line 31). It is argued that the Tribunal acknowledged the issue but did not properly turn its mind to it (Transcript page 3 line 5). It is argued that there is no reference to "*the sheer length of time.*" The MRT however found that the applicant and sponsor lived together "*at all relevant times.*" The MRT found that the applicant and sponsor lived together "*for 6 months or more*", but found that other evidence outweighed that fact. The applicant raised the question of whether it was sufficient for the MRT to find that the applicant and sponsor lived in the same home at all relevant times, or whether it should go further and turn its mind to the fact that they lived together for nearly two and a half years. The finding that they lived together "*at all relevant times*"

was a finding of fact as to the length of time they lived in the same house. There is no statutory requirement to consider the “*actual time of two and a half years*” The Court finds that the finding “*at all relevant times*” is covered by the words “*the length of time during which*” in regulation 1.15A(3)(d)(ii). The Tribunal complied with r1.15A. The Court rejects the submission that the actual duration of two and a half years was a mandatory relevant consideration. The Tribunal finding of “*at all relevant times*” shows that it considered how long the parties lived in the same house.

35. Submissions on the other ground commence at Transcript page 4 line 31, being the identification of items in the master bedroom. The applicant acknowledges that “*this critical issue*” is referred to (at Court Book page 269 point 5) and refers to notes taken during the house visit (Court Book pages 74-75). The applicant contends that the sponsor showing the DIAC officers where her and the applicants’ underwear was in the master bedroom, was the “*clearest relevant material consideration going to the parties living together and their commitment*” (Transcript page 5 line 40). Obviously the Tribunal did not accept that as being so. It is entitled to accept, reject or give weight to the evidence proffered as it thinks appropriate (see *Lee supra*). It is not a valid complaint as to jurisdiction that the Tribunal did not give the weight to the evidence contended for by the applicant (*Lee supra*).
36. The applicant contends that the material “*would be the strongest indication that the parties... were effectively living together*” (Transcript page 5 line 45). That may be the applicant’s view, but the MRT did not err in failing to make that finding. Findings of fact are a matter for the Tribunal (*NAHI supra*). It is not an error of law that the Tribunal did not make a finding of fact contended for by the applicant. He acknowledges properly that there are “*alleged contradictions and inconsistencies*” (Transcript page 6 line 1). The Tribunal stated that when “*asked to show items in the room belonging to each of them they did so*” (Court Book page 269 paragraph 24). Clearly the Tribunal had regard to that evidence. It cannot be complained that the Tribunal did not make the finding of fact contended for by the applicant. Findings of fact are for the Tribunal.
37. It is for the applicant to establish his case.

*“Although the concept of onus of proof is not appropriate to administrative inquiries and decision making (Yao-Jing Li v MIMA (1997) 74 FCR 275 at 288), the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant’s case for him or her: Prasad v MIEA (1985) 6 FCR 155 at 169-70; Luu & Anor v Renevier (1989) 91 ALR 39 at 45. Nor is the Tribunal required to accept uncritically any and all allegations made by the applicant: Rhandawa v MIEA (1994) 52 FCR 437 at 451.”*

38. As stated in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-70: “It is no part of the duty of the decision-maker to make the applicant’s case for him [or her]”.
39. The applicant failed to establish to the satisfaction of the Tribunal, that he and the sponsor lived together in the required sense, and were genuinely committed to one another. The Tribunal considered the evidence that contradicted, and was inconsistent with, such a finding. It is conceded for the applicant that the Tribunal made “a whole series of adverse findings based on the inconsistencies” (Transcript page 6 line 19). The applicant contends that it is not enough for the Minister to say (the Tribunal) having expressly mentioned the evidence, it can hardly be supposed the Tribunal did not have regard to it. The applicant referred to the decision of Riley FM in *MZXIV (No 2)* at paragraph [41] (Transcript page 6 line 26) where Her Honour said that setting out the evidence in the decision is not in itself an indication that the Tribunal has considered the material in the required sense. The Court agrees; however here the material was referred to, and then inconsistencies and contradictions were referred to. The Tribunal therefore “considered” the material.
40. The applicant referred to the decision in *Tickner & Ors v Chapman & Ors* (1995) 57 FCR 451 as “to what it means to “consider” the material placed before a decision maker,” and to “contemplate mentally, fix the mind upon, think over, meditate or reflect on.” Clearly that is what the Tribunal did here. It considered the material and the inconsistencies in, and contradictions of, it.

41. The applicant then referred there to the judgement in *Toro Martinez* [2009] FCA 528 (Transcript page 7 line 17) where Justice Rares found evidence to be “*powerful, strong corroborative and fundamental*” to that case. Weight is a matter for the Tribunal and here the Tribunal did not consider the evidence here to have that weight. That finding is not open to review.
42. The applicant then referred to the judgement in *Migunda v Minister for Immigration and Anor* [2009] FMCA 247 (Transcript page 7 line 28), where there was a failure to have regard to evidence. In the present case the Tribunal did not fail to have regard to the evidence – it simply did not accept it and make the finding of fact that the applicant contends should have been made. That is not a ground for judicial review.
43. As to the submission on the other ground of whether the Tribunal looked at the actual length of time the sponsor and applicant are said to have lived together, the applicant submitted as follows:
44. The Tribunal referring to “*The fact that two persons have lived together for a period of 6 months or more is to be taken as strong evidence of a genuine and continuing relationship.*” (Court Book page 282 paragraph 102), and the Tribunal stating that “*The parties appear to have lived in the same house at all relevant times, but as indicated above, the Tribunal has concerns about the nature of their cohabitation*” does not show that “*the Tribunal fixed its mind upon the actual length of the duration or the length time that they have lived together.*”
45. The Court finds that by referring to the fact that the applicant and sponsor lived together for 6 months or more, and “*at all relevant times*” the Tribunal fixed its mind on the length of time that they lived together.
46. The applicant contends that the Tribunal should have referred to the actual length of nearly two and an half years (Transcript page 8 line 28). That argument has been rejected above. There is no statutory requirement that the Tribunal do that. It had regard to “*all relevant times*” which was the relevant time.



47. The applicant referred to the judgement of Federal Magistrate O'Dwyer in *Ndegwa v Minister for Immigration* [2005] FMCA 74 “Where there was a complete lack of any reference at all to the duration of the relationship, or the length of time during which the parties lived together.” (Transcript page 9 line 2). In the present case the Tribunal found that the applicant and sponsor had lived together at all relevant times. That is a reference to the “length of time” that the parties lived together. A failure to have regard to a mandatory consideration has not been established. The applicant stated that in *Ndegwa* the Tribunal did not state that the parties appeared to have “lived together at all relevant times” (Transcript page 9 line 26). *Ndegwa* is therefore distinguishable.

48. Regulation 1.15A(3)(d) provides that the Minister must have regard to:

“(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and ...”

49. In the present case, regard was had to the fact that the parties had lived together for 6 months or more and at all relevant times. The Tribunal therefore had regard to the duration of the relationship and the length of time which the persons had lived together, being “at all relevant times” (in other words at all times that the Tribunal was required to have regard to).

50. The Minister referred to the Tribunals’ reasons at Court Book page 281. He pointed out that the Tribunal set out the various headings under Regulation 1.15A(3) that required consideration including “(d) the nature of the persons’ commitment to each other.” The Minister referred to paragraph 102 of the Tribunal’s reasons to the evidence that outweighs the strong evidence in favour of finding that there is a genuine and continuing relationship.

51. The Court refers to r. 1.15A(5) which reads as follows:

‘(5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.’

52. If persons live together at the same address for “6 months or longer” that is to be taken as strong evidence that the relationship is genuine and continuing. The test is “6 months or longer.” Here the finding was that they lived together “for 6 months or more” and “at all relevant times” (Court Book page 282 point 6). Once that finding was made, the test in sub regulation (5) was applied. There was no requirement to consider the actual alleged duration of two and a half years. The relevant length of time that the parties had been living together was “for 6 months or longer” and “at all relevant times.” As found by the Tribunal in paragraph 102 (Court Book page 282) other evidence outweighed the strong evidence in favour of the finding that there is a genuine and continuing relationship. The Tribunal found as fact that the sponsor is in a relationship with Mr Chau rather than with the applicant, (Court book pages 283-284 paragraphs [103-104]) and the applicant was living in the spare room [104].
53. At Court Book page 285 paragraph 115 the Tribunal found as a fact that “*it did not accept that the applicant had been a truthful witness and concludes that his relationship with the sponsor had been contrived in order to achieve a migration outcome.*”
54. At paragraph 116 the Tribunal found that it did “*not accept that either the sponsor or the applicant have given truthful evidence, and concludes that the reason for this is that their relationship is not in fact a spousal relationship and that they have told lies in an attempt to conceal, and then explain a considerable body of evidence which contradicts their claim to be spouses.*” It was properly open to the Tribunal to reject the evidence that the applicant and sponsor were spouses (*Lee supra*) and to make the adverse credibility finding. A finding that an applicant is not a credible witness is a “*finding of fact par excellence*” (*Re MIMA; ex parte Durairajasingham supra*).
55. The Minister referred to changes to, and inconsistencies in the applicant’s evidence. The Minister submits as to the applicant’s argument that the Tribunal did not turn its mind to the length of time that the persons lived together, as follows; the Tribunal referred to it as “*at all relevant times.*” The Tribunal found “*the fact that they lived together for 6 months or more is taken as strong evidence...*” (paragraph 102). The Court accepts the Minister’s submission that

having made that finding the Tribunal was bound to treat that as strong evidence, and that it doesn't matter under the regulation whether that period was 1, 2 ½ or 3 years (Transcript page 12 line 21). The Minister referred to the judgement in *Zhang and the Minister for Immigration* (205) FCAFC 30 at [19] and [20]. The Court accepts the Minister's contention that what is said in paragraph [20] is that "*there is no need for the Tribunal to laboriously evaluate seriatim each of the considerations in reg 1.15A*" It is sufficient if the Tribunal considers all the evidence under the headings. Also the Full Court decided at paragraph [19]. "*The fact that the Tribunal has not, in terms, made express findings about each of the matters referred to in placita (i), (ii) and (iii) of subreg 1.15A(3)(c) does not demonstrate in the present circumstances the Tribunal did not have regard to those matters.*" The Court applies that decision to this case and to placita (i), (ii) and (iii) of subregulation 1.15A(3)(d). The Minister submits correctly that "*the reasons of the Tribunal are not to be read with an eye attuned to the ready perception of error*" (*Wu Shan Liang v Minister for Education and Ethnic Affairs* 185 CLR 259 at 272.2).

56. The Minister referred then to the judgement in *Davis v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) FCA 686 at [35] where Justice Dowsett decided that subregulation 3 (of Regulation 1.15A) "*does not require that the Tribunal make specific findings concerning any of those matters.*" The Minister referred then to the judgement in *Chey v Minister for Immigration and Citizenship* (2007) FCA 871 at [51] where Justice Kenny followed the decision of Justice Dowsett in *Davis* (supra) that "*reg 1.15A(3) does not require the Tribunal to make specific findings concerning the matters to which it refers.*" Justice Kenny decided at [51] that "*whether the omission is indicative of jurisdictional error depends very largely on the circumstances of each case*". Justice Kenny decided at [52] that "*The Tribunal made its finding "that it was not satisfied that the appellant and Miss Tong were residing together in Melbourne (and if they were it was not satisfied that the relationship was genuine)."*"
57. In the present case the MRT was satisfied that the applicant and the sponsor were living in the same house but that it is Mr Chau who was in the relationship with the sponsor, and the applicant was living in the spare room (Court Book page 283 point 3); and that the applicant's

relationship with the sponsor was contrived in order to achieve a migration outcome (Court Book 285 point 2); and that “*their relationship is not in fact a spousal relationship.*” (Court Book page 285 point 3).

58. Justice Kenny continued in *Chey* “*In light of this finding, it was open to the Tribunal to determine that it was unnecessary to say anything specifically about either any joint responsibility for care and support of their child (the subject of reg 1.15A(3)(b)(i)) or shared responsibility for housework. Accordingly I would not infer from the Tribunal’s failure to mention the issue of joint child care and support that the Tribunal did not consider it or any other matter it was bound to consider.*” Applying that decision to this case, the Court does not infer that the Tribunal did not consider “*the length of time which the persons have lived together.*” Indeed the Tribunal did consider the length of time being “*6 months or longer*” and “*at all relevant times.*”
59. The Minister contends that “*at all relevant times*” must at the very least span from the date of the marriage (June 2006 (Transcript page 2 line 41) until the date of the hearing (1 October 2008) (Transcript page 16 line 26)). That is a period of 2 years and 4 months. It is not the roll of the Court to make a finding of fact as to that, but the Court finds the contention to be reasonable as to what is meant by “*at all relevant times.*” The applicant contends that the period was two and a half years.
60. The Minister referred then to the judgement *Lee v Minister for Immigration and Indigenous Affairs* [2005] FCA 464. Justice French held that were there was no error of law in the style of reasoning applied by the Tribunal in that case. In *Lee* there was no examination of the specific length of time that the parties had lived together, only that it was “*six months or longer.*” Justice French found at [15] and [16] that “*The Tribunal made express reference to the requirements of subreg (5)*” However, it set against that, other evidence before it, and its satisfaction that the evidence established that the relationship was “*not genuine and continuing*” [15]. Justice French then concluded at [16] “*There is no error of law in the application of sub-reg (5) which would constitute jurisdictional error.*” The Minister submits that the reasoning in *Lee* where there was no mention by the Tribunal of the

actual time that the parties had lived together, can be applied to the present case to show that the Tribunal did not err in law in the way it dealt with regulation 1.15A(3)(d) (transcript page 18 line 6). The Court agrees. Prerogative relief was denied in *Lee*.

61. The Minister submitted as to the applicant's second argument (of an alleged failure by the Tribunal to have regard to the evidence that the sponsor could show officers from DIAC where the applicant's and her items were kept in the master bedroom) that the evidence about identifying where the underwear is kept is not in itself relevant consideration, but only a matter of evidence. The Court accepts that contention and accepts also that even if there was a failure to have regard to that evidence, that would not be a jurisdictional error (Transcript page 18 line 30).

62. As stated in *SZEHN v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1389 at [58]:

*"It is well established that the Tribunal is not obliged to refer in its reasons to every item of evidence that was before it: Muralidharan v Minister for Immigration and Ethnic Affairs (1996) 62 FCR 402 at 414; Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 593; Paul v Minister for Immigration & Multicultural Affairs (2001) 113 FCR 396 at [79]; Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 75 ALD 630 ('Applicant WAEE') at [46]; NAHI v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 10 at [14]. It follows that the omission to refer to a piece of evidence does not necessarily require a conclusion that it has been overlooked: Steed v Minister for Immigration and Ethnic Affairs (1981) 37 ALR 620 at 621 per Fox J; Karras v Minister for Immigration & Multicultural Affairs (1998) 56 ALD 167 at 173."*

63. Failure to take a relevant consideration into account can only be made out where the Tribunal failed to take into account a consideration which it is bound under the Act to consider: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. Where the elements of the claim have been considered, the failure to mention expressly part of the applicant's evidence does not show jurisdictional error: *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 at [79] per Allsop J; *Applicant A169 of 2003 v Minister for*

*Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 8 at [24]; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [68]; *MZXGP v Minister for Immigration and Multicultural Affairs* [2006] FCA 1314 at [13]-[15] per Middleton J.

64. The Minister referred to notes of the home visit (Court Book page 75 point 1) and submits that being able to show where underwear is kept “*is not strong evidence*” Decisions as to the weight of evidence are for the Tribunal, and the Court rejects both this submission, and the submission for the applicant that “*this was strong evidence*” that the parties were living together (*NAHI* supra, *Lee* supra).

65. As stated in *Tefonu Pty Limited v Insurance and Superannuation Commissioner* (1993) 44 FCR 361 per Beazley J at [54]:

“*The weight which is to be given to a relevant factor is a matter for the Tribunal, unless it can be said that the Tribunal’s decision is manifestly unreasonable. (Minister for Aboriginal Affairs and Anor. v. Peko-Wallsend Limited and Ors (1985-1986) 162 CLR 24 at 41; Associated Provincial Picture Houses, Limited v. Wednesbury Corporation (1948) 1 KB 223 at 230, 233-234).*”

66. The decision must be so unreasonable “*that no reasonable body could have come to it*”: *Ibid* at [41]. That has not been shown here.

67. As stated by the Full Court of the Federal Court in *Minister for Immigration and Citizenship v Applicant A125 of 2003* [2007] FCAFC 162 at [95]: “*Plainly, the weight to be accorded to the applicant’s evidence was a matter for the RRT. It is not a matter for this Court*”.

68. As stated by the Federal Court of Australia in *Lee v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 464 at [27]:

“*The Tribunal is entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances.*”

69. The Minister referred them to the judgement in *Applicant WAEE v Minister for Immigration and Multicultural Affairs* (2003) 75 ALD 630 where the Full Court found:

at [46] *“It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons;”*

and at [47]: *“The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected.”*

70. The issue was identified by the Tribunal (Court Book page 269 paragraph 24). Also the issue has been subsumed in findings of greater generality that the applicant and sponsor have told lies (Court Book page 285 point 3); that their evidence on their living arrangements contained many inconsistencies, contradictions and misleading answers; and that the applicant was living in the spare room (Court Book page 283 point 3) and that *“the considerable body of evidence contradicts their claim to be spouses”* (Court Book page 285 paragraph 16).
71. The Court does not draw an inference that the Tribunal here failed to consider the evidence about location of the items. Even if it had, that would not be a jurisdictional error. The Tribunal considered all relevant matters under regulation 1.15A to the extent necessary, including the issue of the *“nature of the household, which incorporates the parties living arrangements”* regulation 1.15A(3)(b).
72. The Minister referred then to the decision in *Li v Minister for Immigration and Citizenship* (2008) FCA 902 where it was argued that the Tribunal was in error because it failed to refer to particular aspects of the evidence before it [17] being the applicant’s claim *“to wish to have a child with the sponsor”* [14]. Justice Jessup distinguished between claims put by the applicant and the evidence in support of these claims. His Honour decided at [23] that *“Such evidence, however, whether advanced by the applicant or obtained otherwise, is not, in my view, of the same legal nature as the claims made by an applicant for a protection visa.”* His Honour then stated at [24] *“However, there is another way in which the submissions made on behalf of the applicant*

*should be understood, namely, as contending that the Tribunal failed to comply with the command in reg 1.15A(3) to have regard to all circumstances of the case.” His Honour held at [27] that because of the terms of s368(1)(c) of the Act,*

*“Which required: the Tribunal to include in its written decision “the findings or any material question of fact,” it must be assumed that, to the extent that the Tribunal made material findings in the present case, it set them out in its decision. It is not, therefore, possible to assume that the Tribunal must obviously, albeit silently, have rejected the evidence of the appellant and her sponsor as to the intention to have a baby... As mentioned above, I consider that the obligation to identify the circumstances by reference to which the Tribunal makes its decision under reg 1.15A is implicit in the way sub-reg (3) is expressed.”*

73. In the present case the Tribunal made material findings that the applicant was living in the spare room (Court Book page 283 point 3), and that the *“sponsor was actually in a relationship with Quan Cuong Chau rather than with the sponsor (sic “applicant”)*” (Court Book page 283 point 4). The Tribunal set out the evidence that led it to those conclusions [at Court Book page 282 paragraph 103 and page 283 and paragraphs 104 – 106]. The Tribunal therefore set out the evidence by reference to which it made its decision under reg 1.15A(3). The decision in *Li* therefore does not indicate that there was a jurisdictional error by the Tribunal in the present case.
74. The Minister sought to distinguish *Li* (supra) on the further ground that in *Li* there was a qualified finding against credibility [25], whereas here the Tribunal found *“that it does not accept that the applicant has been a truthful witness”* and concludes that *“his relationship with the sponsor has been contrived in order to achieve a migration outcome.”* (Court Book page 285 point 2) and (at Court Book 282 paragraph 98) *“the parties claim to have been cohabiting as spouses but the evidence obtained during the site visit and subsequent interview does not support this.”* The Tribunal stated at Court Book page 285:

*“116. For the above reasons, the Tribunal does not accept that either the sponsor or the applicant have given truthful evidence, and concludes that the reason for this is that their relationship is not in fact a spousal relationship, and that they have told lies in*



*an attempt to conceal, and then explain, the considerable body of evidence which contradicts their claim to be spouses. The Tribunal does not accept their explanations.”*

75. The Tribunal rejected the applicant’s and sponsor’s evidence about living in the same room (Court Book page 283 paragraph 104), and found that it was “*the applicant who was living with in the spare room.*” The Minister contends that the decision in *Li* is therefore distinguishable. The Court does not need to decide that issue having decided that *Li* does not indicate that a jurisdictional error was made by the Tribunal in this case.
76. The Minister referred again to *Chey* (supra) as authority for the proposition that the conclusions the Tribunal reaches on one consideration means that it is not necessary for the Tribunal to deal with another consideration, even though the other consideration is mandatory.
77. Paragraph [48] in *Chey* records the finding that the Tribunal did not specifically consider all matters that regulation 1.15A(3) required it to consider. At [51] Justice Kenny found that not making a finding about a specific issue ... “*it does not necessarily follow from this that the Tribunal did not address this specific matter,*” and adopted the decision of Justice Dowsett in *Davis* (supra) at [35] that “*reg 1.15A(3) does not require the Tribunal to make specific findings concerning the matters to which it refers. Whether the submission is indicative of jurisdictional error depends very largely on the circumstances of each case.*” The Court finds that the Tribunal here was not required to make a specific finding on the evidence that the sponsor was able to show where items were kept in the master bedroom.
78. In *Chey* (supra), Justice Kenny decided that in considering regulation 1.15A(3)(b), having found that the Tribunal was not satisfied that the persons were living together, it was open to the Tribunal to determine that it was unnecessary to say anything specifically about the other items in regulation 1.15A(3)(b). The Court accepts the submission for the Minister that the Tribunal here, having found that the applicant lived in the spare room, it was unnecessary to make a specific finding about locating items in the master bedroom.

79. The Court also refers to that decision to find that the Tribunal having found that the “*duration of the relationship was at all relevant times*” it was unnecessary to make a finding on the length of time in months or years during which the persons lived together.
80. The Minister referred to the decision in *MZXIV v Minister for Immigration and Anor (No 2)* [2006] FMCA 1454 and submitted that “*the fact that issues have been identified at some point... doesn’t prove that it is considered, but it is still highly relevant that the Tribunal expressly referred to the material.*” The Court has dealt with this issue above and finds that the Tribunal considered the length of time that the parties lived in the same residence.
81. The Minister referred to the judgement of in *Li v Minister for Immigration and Citizenship* 96 ALD 361 where Justice Kenny decided at [19]:
- “Further, I accept that, as the first respondent submitted, the absence of specific reference to persistence in the Tribunal’s reasons does not demonstrate a failure to take into account “all the circumstances of the relationship” for the purposes of reg 1.15A(3).”*
82. The Minister referred again to the decision of Justice Kenny in *Davis* (supra) that involved subregulation 1.15A(3). Her Honour stated at [35] “*... subreg 1.15A(3)... does not require that the Tribunal make specific findings concerning any of these matters.*”
83. The Minister submits as to the judgement in *Migunda* (supra) that the failure there to consider a letter from the mother meant that it made findings which were plainly against the evidence, and the finding went to a relevant consideration. Here the finding that the applicant lived in the spare room has not been shown to be in error, and even if it is, it is not open to review. “*There is no error of law in the Tribunal making a wrong finding of fact*” (*Abebe v Commonwealth* (1999) 197 CLR 510 at [137])

## **The Applicant Responded**

84. As to the alleged failure to deal with the duration of the relationship and the length of time during which the parties lived together, the

applicant contends that the decision in *Lee* (Supra) is of no assistance to either party. The Court disagrees and refers to its findings on *Lee*.

85. The applicant contends that regulation 1.15A(3)(d)(i) and (ii) and (5) are distinct requirements. The Court accepts that submission but that does not demonstrate any error of law by the Tribunal.
86. The applicant then makes submissions about the weight of the evidence about having clothes in the same room. As stated above “*weight*” is a matter for the Tribunal. Obviously it did not place the weight on that evidence that the applicant would have place on it. The applicant describes the finding on Court Book page 283 paragraph 104 that it was “*the applicant who was living in the spare room*” as “*almost offhanded*” (Transcript page 39 line 8). The Court rejects that submission. That is a significant finding of fact by the Tribunal.
87. The applicant then sets out how he would have the Tribunal express its reasons (Transcript page 39 line 10). That submission is irrelevant to a judicial review.
88. The applicant contends then that the issue of cohabitating in the same room is such a fundamental issue that for the Tribunal to discharge its’ duties under regulation 1.15A, it was obliged to deal with evidence that the parties kept their clothes in the master bedroom. The Court has already made findings on this contention. The Tribunal found, as it was entitled to, that other evidence outweighed the evidence about living in the same room.
89. The applicant then complains that the issue of cohabitating in the master bedroom was never identified as an issue. The Court rejects that submission; that issue was clearly identified. The Tribunal referred to the officers from DIAC being taken into the master bedroom and being shown items in the room, allegedly belonging to each of the applicant and sponsor (Court Book page 269 paragraph 24). The Tribunal identified as issues what the sleeping arrangements in the home were (Court Book page 282 point 9). The Tribunal found that it was the applicant who was living in the spare room (Court Book page 283 paragraph 104).

90. The applicant complains that the evidence about showing items in the room belonging to each other (Court Book page 269 paragraph 24) is “*not even rejected*.” That submission is incorrect. The evidence about living in the master bedroom was specifically rejected by the finding that the applicant was living in the spare room (Court Book 283 paragraph 104).
91. The applicant again contends that there is nothing more direct or touching (the issue), in a more direct way than the evidence about items in the master bedroom (Transcript page 40 line 17). That contention seeks a review of the merits or the weight given to evidence. Such matters are for the Tribunal and not the Court.
92. The applicant submits that *Chey* is distinguishable. The Court repeats its findings as to *Chey*.
93. The Court finds that the Tribunal’s decision is a privative clause decision that has not been infected with jurisdictional error. In such circumstances, and pursuant to s.474 of the Act, there is no jurisdiction for this Court to interfere.
94. The Court dismisses the application.

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**I certify that the preceding eighty-eight (88) paragraphs are a true copy of the reasons for judgment of Turner FM**

Associate: Eyal D’vier

Date: 22 September 2009